THE PROGRESS OF THE LAW

MUNICIPAL CORPORATIONS

I

Legislative Control

THE Legislature has full power to divide, to increase the territory or to abolish municipal corporations, without asking the consent of the inhabitants. This perfectly well settled principle is illustrated by several of the cases of the year under review.[1] If a new corporation is created by the division of an older one, the new corporation is not responsible for the debts of the old unless provision is made to that effect by the Legislature;[2] but if the Legislature chooses it may prescribe as it will for a division whether of the debts or of the property of the corporation.[3] It may also provide for an equitable division of the taxes already levied.[4] In order to carry on local improvements, the Legislature frequently creates special municipal corporations within the territory of the city or town. This it may do at its absolute will, using the same or a part of the same territory for the new corporation.[5]

In all public matters, the Legislature may make any requirement it desires with respect to the acts of the municipal corporation. For instance, it may require a court district to deposit its public funds with the county's treasurer, to be placed in a certain bank;[6] or it may prescribe a course of studies in all the school districts of the state.[7] On the other hand, it may not interfere in purely local affairs such as the appointment of merely local officers.[8]

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[1] Kramer *v.* Renville County, 175 N. W. (Minn.) 101 (1919), *school district*; Pershing County *v.* District Court, 181 Pac. (Nev.) 960, 183 Pac. 314 (1919), *county*; Strasburg *v.* Chandler, 97 S. E. (Va.) 313 (1918), *city*.

[2] West Paterson *v.* Little Falls, 105 Atl. (N. J. L.) 452 (1918).

[3] Yazoo County *v.* Humphreys County, 83 So. (Miss.) 275 (1919); State *v.* Baca County, 182 Pac. (N. Mex.) 865 (1919).

[4] La Salle *v.* Catahoula, 83 So. (145 La.) 250 (1919); Boettcher *v.* McDowall, 174 N. W. (N. Dak.) 759 (1919).

[5] Dahler *v.* Washington S. S. Comm., 133 Md. 644, 106 Atl. 10 (1919).

[6] State *v.* Gaines, 186 Pac. (Wash.) 257 (1919).

[7] State *v.* Totten, 175 N. W. (N. Dak.) 563 (1919).

[8] New Orleans *v.* New Orleans R. & L. Co., 82 So. (145 La.) 280 (1919).

In the administration of these general principles several interesting cases have arisen. In North Carolina a county had been compelled to erect stock-law fences and for that purpose had collected a large fund by special taxation and had built the fences. By a later change in the state legislation the stock-law fences were made unnecessary, and the county was directed by the Legislature to sell them and turn the proceeds into the general fund of the county. Objection was made to this by some of the persons who had been compelled to pay the special tax for building the fences; but the court held that this was a perfectly constitutional law and that the Legislature had the right to dispose of the money as it would.[9]

In *Martin* v. *Wachovia Bank*[10] the Legislature provided for the construction of a bridge and causeway between Martin and Bertie Counties. It appeared that the principal cost was in the causeway which was constructed entirely within Bertie County, but it also appeared that the principal benefit of the bridge and causeway accrued to Martin County. The Legislature provided that three-quarters of the cost should be paid by Martin County. It was held that this was a perfectly proper statute.

In *Duffy* v. *Burrill*[11] provision was made for the collection by the state of an income tax, and its division, after the expenses had been paid, among the cities and towns of the state in proportion to the amount paid by them to the state tax; this being different from the proportion adopted for the assessment of the income tax. The court held that this was entirely within the power of the Legislature; that there was nothing to prevent their making such distribution, provided the property raised by taxation was devoted to a public purpose; and as no city or town could devote such money to any other than a public purpose, the provision was entirely legal.

The opinion of the justices was asked in Massachusetts as to the constitutionality of a proposed law by which the street railways should charge a fare of only five cents, and the expected deficit should be made up by taxes on the people of the benefited territory. The court gave its opinion that this would be proper, being within the power of the Legislature over its municipal corporations. This is a matter of public interest to all the cities and towns

[9] Parker *v.* Johnston County, 100 S. E. (N. C.) 244 (1919).

[10] Martin County *v.* Wachovia Bank & Tr. Co., 100 S. E. (N. C.) 134 (1919).

[11] Duffy *v.* Burrill, 125 N. E. (Mass.) 135 (1919).

involved, and therefore the state could tax them for the carrying on of the public enterprise; it could, therefore, divide the expense among the cities and towns in any way which seemed to the Legislature proper.[12]

The formation of municipal corporations under general statutes passed by the Legislature has become very common, especially in the West and Southwest; and this practice has given rise to an amount of litigation which may properly be described as enormous, but uninteresting.[13]

II

Elections

A question often arises from the ineligibility of one of the candidates in an election. If such an ineligible candidate is elected on the face of the returns, will the person who receives the next highest vote be declared elected, or will there be no election? The generally adopted rule is that unless the ineligibility was well known to the voters at the time of the election, there will be no election in case the person receiving the highest number of votes is ineligible. This general rule was affirmed in the interesting case of *Heney* v. *Jordan*.[14] It was provided by statute that if in a primary election a man chose to be a candidate for both party nominations he might receive both nominations provided he was nominated by his own party; but if he failed of nomination by his own party, he could not then be the candidate of the other party. A person running on both the Republican and the Democratic tickets, but being himself a Republican, failed of nomination on the Republican ticket; he was therefore ineligible under the statute for nomination on the Democratic ticket. It was held that the person having the next vote to him

[12] Opinion of the Justices, 231 Mass. 603, 122 N. E. 763 (1919).

[13] For cases of this sort see the following selected from scores, if not hundreds, decided during the year under review: Busby *v.* Reid, 210 S. W. (Ark.) 625 (1919); Harpham *v.* Ventura County, 182 Pac. (Cal. App.) 324 (1919); Ludlow *v.* Ludlow, 216 S. W. (Ky.) 596 (1919); Bowman-Hicks Lumber Co. *v.* Oakdale, 144 La. 849, 81 So. 367 (1918). The arguments in favor of these general laws is that they save the time of the legislature, and promote self-government. The time of the legislature appears to be saved at the sacrifice of the time of the courts; opinions might possibly differ as to which time is more valuable. Self-government in this case proves to be the power of an irresponsible majority to oppress a minority. It may be doubted whether anything is gained in the long run by this sort of legislation.

[14] Heney *v.* Jordan, 175 Pac. (Cal.) 402 (1918). See comments on this decision in 7 Cal. L. Rev. 63; 32 Harv. L. Rev. 435.

was not nominated, but that there was a failure to nominate. On the other hand, in the case of *Justice* v. *Justice*,[15] the court reached a contrary conclusion. In that case the nominee who received the highest number of votes was not legally on the ballot because of some informality in his nomination papers. It was held that the other party on the ballot, who received less votes, was elected. It is submitted that this decision is not in accordance with the general rule, nor does it seem to be at all justified by any consideration of *justice*.

III

Officers and Administrative Boards

The distinction between an officer and an employee, — that the officer must have definite duties laid down by law and not be subject to direction by any one else in the performance of his duties, that he must take the oath of office and exercise a special public trust, — is illustrated by several interesting cases. In Arkansas the majority of the court held that a city manager is a public officer, and incidentally that the provision in the statute creating the office, that he need not be a resident of the city, is unconstitutional where the constitution requires that any officer of the city shall have the qualifications of an elector.[16] In the Federal Court it was held that a person who manages a public utility board for the city is not an officer, since the utility is a commercial function and has no governmental significance; and the manager of a municipal lighting plant is therefore on the same plane as the manager of a private lighting plant.[17] In a Florida case, it was held that a "rural school instructor" is a public officer.[18] The old rule that the city council is the city finds an interesting development in a Texas case.[19] The question there was as to the domicile of a school district; it was held that the Board of Trustees represented the district legally and that the domicile of the district was "where the trustees reside or have their place of business." It seems clear that the regular meeting-place, the "place of business," of the trustees is the domicile of the district, and not the residences of the individual trustees.

[15] Justice *v.* Justice, 184 Ky. 130, 211 S. W. 419 (1919).
[16] McClendon *v.* Hot Springs, 216 S. W. (Ark.) 289 (1919).
[17] Rockhill I. & C. Co. *v.* Taunton, 261 Fed. 234 (1919).
[18] State *v.* Sheats, 83 So. (Fla.) 508 (1919).
[19] State *v.* Waller, 211 S. W. (Tex. Civ. App.) 322 (1919).

In *Grosjean* v. *San Francisco* [20] a rule of the Board of Education had been unanimously suspended at a meeting of the Board, and a new rule passed under the suspension of the rule. The rules contained a provision that no alteration of the rules should be adopted unless it had been presented in writing at a previous meeting. This had not been done. There was no provision in the rules for a suspension of a rule. It was held that the new rule had been properly adopted, on the ground that the rule was

"merely a rule of parliamentary procedure adopted for the guidance, and it may be protection, of the members of the board, and which they had power to suspend or ignore when occasion required, and, in respect to their action in so doing, no one but the members of the board themselves would have a right to complain."

Authorities were cited in favor of this view; there are equally strong authorities against it.[21]

The position of the court here seems to the writer untenable. It is based upon the assumption that the majority of a legislative body may act as it pleases, and cannot tie its own hands from so acting by any rule requiring time for consideration or the vote of more than a majority before action is taken. But this does not seem sound. The action of a legislative body is more than the mere agreement of the members. If the members, in open meeting, all signed a proposed act this would not constitute an act of the body. To be the act of the body rather than that of its members, the vote must be proposed, put, and passed in accordance with parliamentary law and the rules that govern the body. In order to provide for a case of emergency, where all the members desire to avoid a requirement of a rule, it is customary to provide for a suspension of the rules by a large majority or by a unanimous vote. Here there was no such provision.

The result may perhaps be reached by a different line of reasoning. All acts of a subordinate body acting under a general power must be reasonable or they are invalid. The rule as adopted, without provision for suspension, seems unreasonable as unduly tying the hands of the board; the action of the board, therefore, in suspending the rule by a unanimous vote was valid.

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[20] 181 Pac. (Cal. App.) 113 (1919).

[21] Swindell *v.* Maxey, 143 Ind. 153, 42 N. E. 528 (1895).

IV

Performance of Duty

In *Valentine* v. *Independent School District*,[22] a pupil who had passed all grades in a public school brought a petition for mandamus to compel the school authorities to give her her diploma and a record of her grades. It appeared that the scholars had been required to wear a cap and gown at the graduating exercises, and that the cap and gown provided by the school department had previously been worn by a person afflicted with contagious disease, but had been fumigated. The pupil refused to wear cap and gown on the ground that it was dangerous, and she was thereupon excluded from the graduating exercises and refused a diploma and information about her grades. The court held that this was arbitrary and unreasonable treatment, that the diploma had been earned by the passing of the required tests and that being present at the graduating exercises was not one of these tests, that the grade of a pupil in a public school is a public record to which such pupil is entitled to access, and therefore granted the petition. This case illustrates very neatly the requirement of reasonableness in every action of a legislative or administrative board, acting under the general authority of the law.

In *Beem* v. *Davis* [23] the court required the city to administer its own fire ordinance by tearing down a building built in violation of the ordinance. This seems an unusual exercise of the writ of mandamus, since generally officers are not required by the court to do any discretionary act in the ordinary administration of the law. The general acceptance of the doctrine of this case, however, would lead to a better administration of government. The danger is, that the judges might allow themselves to be substituted, as instruments for good government, for the officers elected by the people.

The power of the mayor or prosecuting attorney to acquire information for the purpose of preventing violation of the law is not popular in the far West. In two cases it has been denied.[24] Whether the nature of the offence to be detected influenced these decisions does not appear.

[22] Valentine *v.* Independent School District, 174 N. W. (Ia.) 334 (1919).

[23] Beem *v.* Davis, 31 Ida. 730, 175 Pac. 959 (1918).

[24] Tate *v.* Johnson, 181 Pac. (Ida.) 523 (1919); Irwin *v.* Klamath County, 183 Pac. (Ore.) 780 (1919).

V

Resignation and Removal of Officers

The appointing power included at common law the full power also of removing any employees not employed for a given term.[25] Under the Civil Service laws now almost universally passed an employee cannot be removed except for cause and after a hearing. In the case of *Eisberg* v. *Mayor* [26] the question whether a policeman had a fair hearing on the complaint for his removal came before the court. In that case a policeman was complained of by one of the members of the Council, a second one did not hear the testimony against him, but merely appeared as a witness against him, and two other members of the Council also appeared as witnesses against him. He was ordered removed by a vote of 4 to 2. It was held he had not had a fair trial; a conclusion which seems well within the bounds of reason. In a similar case, an old employee gave evidence of suffering from nervous prostration or from mental derangement. He was removed for insubordination without any inquiry as to the condition of his health. This also was held to be unfair and his reinstatement ordered.[27]

Where a county officer was drafted into the army, it was held that this involuntary action from service would not deprive him of office.[28]

The fact that resignation of an officer does not terminate his office, but that acceptance of the resignation by the proper authorities is required, is perfectly clear, but appears to be ignored by many lawyers. It has been necessary to reaffirm this doctrine in two cases during the year under review.[29]

VI

Ordinances

The general principle that an ordinance in order to be valid must be reasonable has been discussed in several cases. The ordinance has been found to be valid in a case where the keeping of

[25] State *v.* Wunderlich, 175 N. W. (Minn.) 677 (1920).

[26] Eisberg *v.* Mayor of Cliffside Park, 92 N. J. L. 321, 105 Atl. 716 (1919).

[27] People *v.* Connolly, 184 App. Div. 587, 172 N. Y. Supp. 48 (1918).

[28] Hamilton *v.* King, 206 S. W. (Tex. Civ. App.) 953 (1918).

[29] State *v.* Bush, 208 S. W. (Tenn.) 607 (1919); State *v.* Jefferis, 178 Pac. (Wyo.) 909 (1919).

livery stables within a residential district was forbidden,[30] where an inspection of dairies was ordered,[31] and where a fee was placed upon an outside merchant doing business within the city.[32] In *ex parte* Blois [33] it was held that a city ordinance of Palo Alto requiring an inspection of all laundries in which clothes from that place were washed was legal, although in its application it covered laundries in other cities; but that in the particular case a mileage fee of 30 cents per mile both ways for the inspector was unreasonable. On the other hand, in a Florida case [34] an ordinance ordering the closing of places of business at 6.30 o'clock P. M. was held unreasonable. In *Rhea* v. *Board of Education* [35] the Supreme Court of North Dakota held that a regulation of the board of health, requiring vaccination before a child was enabled to attend the public schools, was invalid. It seemed to the majority of the court enough to say that the schools were public schools and every member of the public had a right to attend them. The reasoning of Mr. Justice Robinson is as interesting as always. In *St. Louis Poster Advertising Co.* v. *St. Louis* [36] an ordinance limiting the size and strength of billboards was allowed to stand, and Mr. Justice Holmes made the important remark that "if the city desired to discourage bill boards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in Thomas Cusack Co's Case."

VII

Highways

The right of everyone to the use of a public highway is asserted in *Sumner County* v. *Interurban Transportation Company*,[37] where it appeared that the plaintiff was using trucks of a heavier sort than usual, which injured the roadway. The court held that the right to use the highway was not limited to use with light vehicles, and that the plaintiff had a perfect right to make use of the highway

[30] Boyd *v.* Sierra Madre, 183 Pac. (Cal. App.) 230 (1919).
[31] Creaghan *v.* Baltimore, 132 Md. 442, 104 Atl. 180 (1918).
[32] State *v.* Cater, 182 Ia. 905, 169 N. W. 43 (1918).
[33] *Ex parte* Blois, 176 Pac. (Cal.) 449 (1918).
[34] *Ex parte* Harrell, 79 So. (Fla.) 116 (1918).
[35] Rhea *v.* Board of Education of Devils Lake Dist., 171 N. W. (N. Dak.) 103 (1919).
[36] St. Louis Poster Advertising Co. *v.* St. Louis, 39 Sup. Ct. Rep. 274 (1919).
[37] Sumner County *v.* Interurban Transp. Co., 141 Tenn. 493, 213 S. W. 412 (1919).

with his truck. For the same reason a charge cannot be made for the ordinary use of the street, unless it is allowed by statute.[38]

A right granted by a city to a public utility to use the streets is often called a franchise; wrongly, as it seems to the writer, since the city has no right in the street except as a regulator of the public use. If the public use requires the operation of the utility, then, in the exercise of its duty to regulate use, the city should allow the utility to use the streets. On the other hand, if the public does not require such use, the city has no authority whatever to grant it, any more than it would have to grant the use of any private property. This right to use the streets is more properly called a license than a franchise.[39] This license, when acted upon by the utility, becomes, as it is sometimes called, a contract,[40] so far, at least, that the city cannot interfere with the property of the utility used in the exercise of the granted right.[41] Such a contract may be modified in the exercise of the police power of the city, since that is a governmental power, the use of which cannot be affected by any contract of the city. But in any other case the city is bound by its contract. This appears in two interesting cases in the Supreme Court of the United States. In the first, the city having granted a right to two electric companies to use the streets, thereupon decided itself to go into the business of supplying electricity to the city, and ordered the removal of poles by one of the companies. It was held that it could not thus violate its obligation, since the only thing in question was its desire itself to engage in a commercial business.[42] In the other case, an ordinance required the street railway company to sprinkle the roadway between its tracks; this was held to be an exercise of the police power and to be valid, notwithstanding the fact that the city had granted the company the use of its streets for the purpose of running a street railroad.[43] The police power of the state also justified an order of the city of Denver, requiring the removal from the street of certain tracks which had become a danger to traffic.[44]

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[38] Forbes P. B. Line *v.* Everglades Drainage Dist. 82 So. (Fla.) 346 (1919).
[39] Sullivan *v.* Central Ill. P. S. Co., 287 Ill. 19, 122 N. E. 58 (1919).
[40] Sullivan *v.* Best, 281 Ill. 315, 121 N. E. 565 (1919).
[41] Burlington L. & P. Co. *v.* Burlington, 106 Atl. (Vt.) 513 (1918).
[42] Los Angeles *v.* Los Angeles G. & E. Corp, 40 Sup. Ct. Rep. 76 (1919).
[43] Pacific G. &. E. Co. *v.* Sacramento, 40 Sup. Ct. Rep. 79 (1919).
[44] Denver & R. G. R. R. Co. *v.* Denver, 39 Sup. Ct. Rep. 450 (1919).

Where the time set for a franchise has expired, the city may undoubtedly require the removal of the tracks from the streets, since in its capacity as caring for the traffic of the streets, it may clear the streets for the promotion of traffic.[45] If, however, the city does not so order, the street railroad continuing to operate after the expiration of its franchise is not trespassing but is making a proper use of the streets; and it has been held that while the city may order the company under those circumstances to leave the streets altogether, it may not impose an illegal exaction upon the company as compensation for its continuing to use the streets. Such an exaction being illegal, is void, and the order does not drive the company off the streets if it refuses to submit to the void exaction.[46]

The right of the city, even the obligation of the city to exact compensation for the grant of a franchise has been asserted in some cases.[47] It is submitted, however, that this is entirely improper, since the city as has been seen can make no charge upon an individual for the use of the public highway; and since the public utility is exercising the right of the individuals who are primarily benefited by the franchise to use the streets, and whose right to use the streets is in question, it seems clear that no charge can be made against the utility. It is said that this is for the privilege of granting the franchise; but, as has already been seen, the city is entitled to no compensation for doing this public duty, for it has nothing to sell. If the public's requirements compel the use of the streets in this way it is already the duty of the city to grant the permission. If they do not, the city cannot by granting the license cause a public inconvenience in order to secure money from the utility.

A question sometimes arises between the city, county and state as to its highways. In a case where the city had been extended by annexation to include territory of the surrounding county, it was held that a county highway in that territory continued to be a county highway, although the city had come to have the power of regulating the use of it.[48] In two Pennsylvania cases, where

[45] Detroit United Ry. Co. *v.* Detroit, 39 Sup. Ct. Rep. 151 (1919).
[46] Doherty *v.* Toledo R. & L. Co., 254 Fed. 597 (1918).
[47] Valley Rys. *v.* Mechanicsburg, 108 Atl. (Pa.) 629 (1919).
[48] Morrison *v.* Lafayette, 184 Pac. (Col.) 301 (1919).

former county highways had become part of a state highway, it was held that the county still had the obligation of repair.[49]

VIII

Powers

While it is clear that the power of regulating the charges of public utilities is in the state,[50] it has nevertheless been held in *City of Denver* v. *Mountain State Telephone Company* [51] that a city which has been given full home-rule powers may exercise this power of regulating rates without express authority from the state.

In *St. Hedwig's Industrial School* v. *Cook County* [52] it was held that the city might, by contract, pay a certain amount per month for the support and teaching of children of the city in the industrial school. Wherever the city has entire control over the teaching in the school, and over the treatment of the children, this would seem to be correct; otherwise it appears to be an appropriation of money for private purposes.[53]

In *Kirksey* v. *Wichita* [54] the court asserted the power of a city by ordinance to provide for the removal of all house waste and offal, even though it contained things which were still valuable for food.

IX

Property and Funds

The city having raised funds for a certain purpose, cannot divert them to other purposes. Thus a school fund cannot be diverted to the general purposes of the city,[55] nor can a fund raised to repair roads be diverted to a general fund.[56]

Where land has been dedicated to a certain public purpose, it cannot be diverted from that purpose and used for another; for

[49] Com. *v.* Dickey, 262 Pa. 121, 104 Atl. 870 (1918); Dougherty *v.* Black, 262 Pa. 230, 105 Atl. 82 (1918).

[50] Kalamazoo *v.* Titus, 175 N. W. (Mich.) 480 (1919).

[51] Denver *v.* Mountain States T. & T. Co., 184 Pac. (Col.) 604 (1919).

[52] St. Hedwig's Industrial School *v.* Cook County, 289 Ill. 433, 124 N. E. 629 (1919).

[53] Hitchcock *v.* St. Louis, 49 Mo. 484 (1872).

[54] Kirksey *v.* Wichita, 103 Kan. 761, 175 Pac. 974 (1918).

[55] Miami B. & T. Co. *v.* Broward County, 80 So. (Fla.) 307 (1918); Hylan *v.* Finegan, 105 N. Y. Misc. 685, 174 N. Y. Supp. 45 (1919).

[56] Dickinson *v.* Blackwood, 184 Pac. (Okla.) 582 (1919).

instance, a park cannot be changed into a boulevard.[57] If, however, the property has ceased to be used for a public purpose, or if property is held by the city which never was dedicated to a public purpose, it may be sold or leased by the city at its will,[58] and its control over the property cannot be taken away by mandamus.[59] So where the title to a highway is in the city on vacating the highway the city may sell the land, if no private rights or easements prevent.[60]

Unused public land of the city may be leased to a private person for any use which does not interfere with the city activities. For instance, land which is part of a park, but not necessarily used for the moment for park purposes, may be leased for beautiful gardens[61] or for a museum.[62]

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[57] MacLachlan *v.* Detroit, 175 N. W. (Mich.) 445 (1919).

[58] Islip *v.* Havemeyer Point, 224 N. Y. 449, 121 N. E. 351 (1918).

[59] People *v.* Malone, 175 N. Y. Supp. (Misc.) 465 (1919).

[60] Krueger *v.* Ramsey, 175 N. W. (Ia.) 1 (1919).

[61] International Garden Club *v.* Hennessy, 104 N. Y. Misc. 141, 172 N. Y. Supp. 8 (1918).

[62] Williams *v.* Gallatin, 108 N. Y. Misc. 187, 178 N. Y. Supp. 148 (1919).